

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE COMMISSIONER OF VETERANS AFFAIRS

Kenneth Ray Anderson,

Petitioner,

vs.

City of Dayton,

Respondent.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

The above-entitled matter came on for hearing before Kathleen D. Sheehy, Administrative Law Judge, on June 9, 2003, at the Office of Administrative Hearings. The post-hearing briefs were received on June 24, 2003.

Kenneth Anderson, 11116 Hillsboro Avenue North, Champlin, Minnesota 55316, appeared for himself without counsel.

Pamela L. VanderWiel, Esq., Greene Espel, PLLP, 200 South Sixth Street, Suite 1200, Minneapolis, Minnesota 55402, appeared for the City of Dayton.

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Veterans Affairs will make the final decision after review of the record and may adopt, reject, or modify the Recommendations contained herein. Pursuant to Minn. Stat. § 14.61, the Commissioner shall not make a final decision until this report has been made available to the parties for at least ten days. An opportunity must be afforded each party adversely affected to file exceptions and to present argument to the Commissioner. The parties should contact the Commissioner of Veterans Affairs to ascertain the procedure for filing exceptions and presenting argument. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

STATEMENT OF ISSUE

Is the position of City Planner/Zoning Administrator in the City of Dayton a department-head position that is exempt from the Veterans Preference Act, Minn. Stat. §§ 43A.11 and 197.46?

The Administrative Law Judge concludes that the position is not exempt from the Veterans Preference Act and that the City of Dayton violated the petitioner's rights under Minn. Stat. §§ 43A.11 and 197.46 by filling the position without consideration of the petitioner's status as a veteran.

Based upon the record herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The petitioner, Kenneth Anderson, is a veteran honorably discharged from the United States Air Force on April 5, 1979, after four years of service as a security specialist. Mr. Anderson was discharged because of a service-connected disability (diabetes) that precluded his being stationed outside the United States.^[1]

2. In 1983 the petitioner earned a bachelor's degree in Public Administration. In 1985 he completed a master's degree in urban and regional studies at Minnesota State University in Mankato. From 1985 to 1989 he worked as a financial consultant/senior project manager for a firm providing services to cities, counties, and school districts concerning the structuring and sales of bond issues. From 1989 through 1996 he worked in various capacities for the City of Belle Plaine (economic development coordinator, community development director, and acting city administrator). Belle Plaine has a population of about 4,700 and is located just outside the seven-county metropolitan area. From 1996 through 2001 the petitioner worked for the City of Columbia Heights as community development director.^[2]

3. The City of Dayton has a population of approximately 5,000 people. It is located in the northwest corner of Hennepin County, with a small area located in Wright County. The City has one small industrial park, but its businesses are predominantly agricultural.

4. In October 2002 the City of Dayton advertised an opening for the position of City Planner/Zoning Administrator in a newsletter published by the League of Minnesota Cities. This advertisement provided as follows:

This position performs technical and specialized work and is responsible for zoning administration, zoning ordinance maintenance and enforcement, comprehensive planning and implementation of property maintenance, subdivision and related city ordinances and policies to promote and ensure sound community growth, health, and safety.^[3]

The qualifications listed were a bachelor's degree in urban planning, development, business or public administration and 2-4 years experience in local government.^[4]

5. Mr. Anderson saw the advertisement and on October 14, 2002, he forwarded a cover letter and resume to Shirley Slater, the City Administrator. In all, the City received 22 resumes in response to the advertisement.

6. A committee of three persons reviewed the resumes individually and then met to discuss who should be interviewed: Shirley Slater; Douglas Anderson, a member of the Dayton City Council; and Greg Ingraham of Ingraham & Associates, a consulting firm that is by contract the City Planner.^[5] The committee members were looking for someone with slightly more experience than the previous city planner/zoning administrator, who had started as an unpaid intern and had three to four years of experience in the job. Because much of the job involved enforcement of the zoning code, they were interested in finding someone who would be challenged by this relatively routine work but had the potential to handle more complex development issues as the City grows over the next five to ten years.^[6]

7. In reviewing the resumes, the committee set aside the ones from applicants they deemed to be unqualified or for other reasons not a good fit, and narrowed the pool down to five or six persons to be interviewed.^[7] Mr. Anderson was not selected for an interview. The consensus of the group was that Mr. Anderson was qualified but had too much experience to be interested in the job long-term and was not likely to be interested in the lower end of the salary range, which is what the City wanted to pay.^[8]

8. An interview panel composed of Slater, Anderson, and Ingraham, as well as Mark Hanson (the contract City Engineer) and Scott Hoke (Chair of the City Planning Commission) interviewed the top five candidates. The City asked the same 11 questions of each applicant and scored the responses up to five points per question, for a total of 55 possible points.^[9]

9. Based on the recommendation of the interview panel, three names were forwarded to the City Council, and one of the three finalists was eventually hired in early January 2003.

10. At no point during the hiring process—reviewing the resumes, interviewing the candidates, or in discussions with the City Council—did the City take veterans status into consideration or attempt to comply with the Veterans Preference Act.

11. In January 2003, Slater sent the petitioner a letter thanking him for having submitted his resume and notifying him that the City had appointed someone else.^[10]

12. On February 11, 2003, the petitioner requested that Slater send him the score he was given in the City's evaluation of all prospective candidates and information about how the veterans preference points were reflected in the score.^[11]

13. On February 20, 2003, Slater wrote to the petitioner and told him that veterans preference points are only allocated to qualified candidates that receive a passing score pursuant to Minn. Stat. § 43A.11, subd. 3. The letter further provided that "Here, the City determined that your qualifications did not meet the requirements of the position. As such, there was no score and no veteran's preference points."^[12]

14. In suggesting that the City had applied the Veterans Preference Act during the hiring process, and in stating that the City had determined that the petitioner was not qualified for the position, Slater was not being truthful.

15. On February 24, 2003, the petitioner called Slater and asked her what requirements of the position he failed to meet. Slater told him that when she said he was not qualified, she meant that he was overqualified for the position, he had too much experience, and this was a "small job" suitable for a "first-time kind of planner with just not a whole lot of experience."^[13]

16. On February 25, 2003, the petitioner wrote again to Slater, requesting an explanation of how the City determined he did not qualify for the position. An attorney from the Hoff, Barry & Kuderer law firm in Eden Prairie, Minnesota responded to him, stating that he "did not have the appropriate level of experience. Therefore, the selection committee determined that you were not qualified."^[14]

Department Head Exemption

17. At the hearing, the City contended that the City Planner/Zoning Administrator position was a department-head position that is exempt from the Veterans Preference Act.^[15]

18. There are no other employees in the department. The position is a one-person department called "City Planner/Zoning Administrator."^[16] The person in this position supervises no other city employees^[17] and has no authority to hire or fire any personnel.^[18] The position reports to Slater, who does the performance reviews, and Slater in turn reports to the City Council.^[19] According to the job description, the person in this position does "supervise" the Building Inspector and Fire Marshal, but these are contract positions as opposed to being employees of the City.^[20] The essential functions of the job include responding to general inquiries concerning zoning and land use under the City Code; analyzing, reviewing, and providing recommendations to the Planning Commission and the City Council; directing and preparing Planning Commission agendas, reports, and staff recommendations; working with staff and consultants to amend the Comprehensive Plan as needed; performing site inspections to ensure that building codes are being followed; assisting in issuing building permits at

the front counter; and reviewing applications for zoning code and subdivision code requirements.^[21]

19. The City Planner/Zoning Administrator position has no authority to make policy decisions. That authority is reserved to the City Council.^[22]

20. The City Planner/Zoning Administrator position does not function at the level of an elected official.^[23] It includes ministerial and supportive tasks such as preparing meeting agendas, assisting people in obtaining building permits at the counter, stapling, and collating written materials.

21. The petitioner does not seek to have the City Planner/Zoning Administrator position vacated and has no desire to be interviewed for or appointed to the job.^[24] He has recently obtained other full-time employment that requires him to move outside the metropolitan area.^[25]

22. The petitioner has incurred copying costs in the amount of approximately \$129 and spent at least 40 hours in preparation for the hearing in this matter. He also spent considerable time researching and writing his closing brief.

23. After receiving the petition for relief in this matter, the City Administrator asked the City Attorney to review the City's personnel policy manual and make any changes necessary to comply with the Veterans Preference Act. The City Administrator also attended a seminar sponsored by the League of Minnesota Cities and obtained forms to be used for applications for future job openings.^[26]

Procedural Background

24. On March 25, 2003, the petitioner filed a petition for relief with the Department of Veterans Affairs alleging that the City had failed to consider him for the position in violation of the Veterans Preference Act, failed to notify him of a passing rating and the option to use veterans preference points, and failed to have a 100-point based rating system to effectuate the requirements of the Veterans Preference Act. The petitioner asked for relief in the form of (1) an order that the City immediately institute a formal hiring process that maintains full compliance with the Veteran's Preference Act; (2) a written letter of apology and a written notice of the final decision in this proceeding be sent to all applicants for the position; and (3) lost compensation and benefits for one year in the amount of \$45,892.32.^[27]

25. The Department of Veterans Affairs issued a Notice of Petition and Order for Hearing in this matter on April 8, 2003. The hearing was scheduled for May 30, 2003.

26. At the request of counsel for the City of Dayton, and with the agreement of the petitioner, the hearing was rescheduled for June 9, 2003.

Based upon the above Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. Pursuant to Minn. Stat. §§ 14.50 and 197.481, subd. 4, the Commissioner of Veterans Affairs and the Administrative Law Judge have jurisdiction in this matter.
2. The Department of Veterans Affairs has complied with all procedural and substantive requirements of law or rule.
3. The petitioner is an honorably discharged veteran within the meaning of Minn. Stat. § 197.447 who is entitled to the benefits and protections of the Veterans Preference Act. The petitioner has a service-connected disability as adjudicated by the United States Veterans Administration rated at less than 30%.
4. The Veterans Preference Act recognizes that training and experience in the military services of the government and loyalty and sacrifice for the government are qualifications of merit which cannot be readily assessed by examination.^[28] The Act further provides that there shall be added to the competitive open examination rating of a disabled veteran, who so elects, a credit of ten points provided that the veteran obtained a passing rating on the examination without the addition of the credit points. An eligible with a rating augmented by veterans preference points shall be entered on an eligible list ahead of a nonveteran with the same rating.^[29]
5. The provisions of Minn. Stat. § 43A.11 granting preference to veterans in the state civil service shall also govern preference of a veteran in the counties and other political subdivisions of this state.^[30] Political subdivisions of the State must adapt their hiring systems to a 100-point rating system in order to effectuate the intent of the Veterans Preference Act and to allow for uniform application of veterans preference points.^[31]
6. The City of Dayton is a political subdivision of the State of Minnesota within the meaning of Minn. Stat. § 197.455.
7. The legislature has exempted from the Veteran's Preference Act the following positions: private secretary, teacher, superintendent of schools, or **one chief deputy of any elected official or head of a department**, or any person holding a strictly confidential relation to the appointing officer.^[32]
8. Typically, a veteran has the burden of proving a violation of the Veterans Preference Act.^[33] The burden of establishing the department-head exemption, however, is on the appointing authority.^[34]

9. The City has failed to establish that its City Planner/Zoning Administrator position is a department-head position that is exempt from the Veterans Preference Act.

10. The City of Dayton violated the petitioner's veteran's preference rights in filling the position of City Planner/Zoning Administrator without compiling a list of eligibles through use of a 100-point rating system and without allocating him an extra 10 points to which he was entitled as a disabled veteran.

11. The remedy available under the statute is to require the City to vacate the hiring decision for the City Planner/Zoning Administrator position, reopen the position, and conduct a new selection process based upon the proper identification of the veterans status of applicants, appropriate application of a 100-point rating system, and allocation of ten additional points to the petitioner in recognition of his status as a disabled veteran.

12. Because the petitioner does not seek to have the position vacated or to go through the interview process with the City of Dayton, only nominal damages are available as a remedy for vindicating his rights.

13. The petitioner is entitled to nominal damages in the amount of \$1,000.

14. The Memorandum attached hereto is incorporated by reference.

Based on the above Conclusions of Law, the Administrative Law Judge makes the following:

RECOMMENDATIONS

IT IS RESPECTFULLY RECOMMENDED THAT the Commissioner of Veterans Affairs issue an Order determining that:

1. The City of Dayton filled the position of City Planner/Zoning Administrator in violation of the Veterans Preference Act;
2. The City of Dayton shall conform its hiring procedures to the requirements of the Veterans Preference Act; and
3. Petitioner is entitled to nominal damages in the amount of \$1,000.

Dated this 24th day of July, 2003

/s/ Kathleen D. Sheehy

KATHLEEN D. SHEEHY

Administrative Law Judge

Reported: Tape recorded (three tapes)

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the commissioner is required to serve the final decision upon each party and the Administrative Law Judge by first-class mail.

MEMORANDUM

The City's argument that that the City Planner/Zoning Administrator position is exempt from the Veterans Preference Act is based on the exemption language contained in Minn. Stat. § 197.46. While this section does not expressly exempt department heads, the Minnesota Supreme Court has determined that department heads are excluded by implication because of the statute's explicit exclusion of chief deputies of department heads.^[35]

The exemption is a narrow one and is limited to persons in positions with authority comparable to that of an elected official, who are vested with discretion in the performance of their duties, "not subject to direction from superior authority but on the contrary possessing the necessary authority to appoint clerks and subordinates."^[36] The "head of a department" ordinarily means the head of some government division that is important enough to have a deputy. The Minnesota Supreme Court has held that, while cases may arise in which a department has only one employee, who thereupon would be the head of the department, "we believe that ordinarily, before anyone could be classified as a head of a department, the department must be sufficiently important as to include more than one employee."^[37]

The Minnesota Supreme Court has identified several other factors to consider in determining whether the position at issue is a department head, including:

1. Does the alleged department head have charge of the work done by his department?
2. Does his work require technical, professional training?
3. Is he the highest authority at that level of government as to his official duties?
4. Does he supervise all of the work in his department?
5. Does the success of his department depend on his technique?
6. Are the employees in the department under his direction?
7. Are his duties more than merely different from other employees?

8. Does he have power to hire and fire subordinates?^[38]

Many of these factors have little relevance when there is only one person in the department. The person holding the only position in a department will always “have charge of the work done” in the department and be responsible for the success of the department’s work. Moreover, the City’s argument that the position meets many of these criteria is fundamentally inconsistent with the testimony by City witnesses that the position encompassed mundane, routine tasks suitable for a planner with little experience and would not be sufficiently challenging for someone with the petitioner’s level of experience.

In this case, the record establishes that the City Planner/Zoning Administrator position is not one that has authority comparable to that of an elected official, discretion to set policy, or even the ability to hire or fire anyone else. In *State ex rel. Sprague v. Heise*, the Supreme Court determined that a building inspector was not a department head because he was the sole employee doing that type of work; he had no power to hire or fire subordinates; he had no discretion in fixing fees; he was answerable to the village council; and while he had a part-time clerk who kept the records, he could neither hire nor fire her nor otherwise control her work.^[39] The situation is similar in this case. There are several layers of authority above the person in this position, including the City Administrator and the City Council. The City Council has reserved for itself all power to set policy. The position has no power to hire or fire, no discretion to set fees, and no supervisory authority over the part-time shared clerk. In short, the City Planner/Zoning Administrator is a one-person department because the City’s needs in this area are met by one person, not because the position is of such importance that the person who holds the job is vested with the discretion to define it.^[40]

On balance, based upon a consideration of all the factors identified in *Sprague* and *McGinnis*, the Administrative Law Judge concludes that this position is not a department-head position that is exempt from the Veterans Preference Act. The position simply does not have the requisite level of authority, responsibility, independence of action, and degree of critical decision-making necessary to be a department head.

As a remedy, the statute would permit the Commissioner to order that the position be vacated, reopened, and filled using a process that permits the allocation of veteran’s preference points in ranking a list of eligibles. The City concedes that if such a process had been used, the petitioner would have been entitled to receive an interview.^[41] Instead, the petitioner seeks an apology, a written notice of the violation sent to all applicants, and compensation for lost wages (between \$15,056.07 and \$21,741.55, depending on where in the salary range the petitioner believes he would have been hired).^[42] These are not remedies authorized by the statute. The issue here is not whether the petitioner would have been hired or what he would have been paid, but whether in ranking a list of eligibles the City gave the petitioner the 10-point preference to which he was entitled as a disabled veteran. When a veteran has

received the appropriate number of preference points and has been ranked correctly on an eligible list, the veteran has been afforded all of the preference entitled to him by law.^[43]

Minn. Stat. § 197.481, subd. 1, provides that the Commissioner of Veterans Affairs has the authority to grant veterans “such relief the commissioner finds justified” by the veterans preference statutes. In other cases, the Commissioner has awarded nominal damages, not as an equivalent for the wrong, but in recognition of a technical injury and by way of declaring a right.^[44] The petitioner was required to make substantial efforts to obtain this acknowledgement that his rights were violated. Because of his diligence in seeking and obtaining other employment, he is not interested in putting the City through the process of vacating, reopening, and filling the position in accordance with the Veterans Preference Act. Under the circumstances, an award of \$1,000 in nominal damages is justified.

K.D.S.

^[1] Ex. 18, Testimony of Kenneth Anderson.

^[2] Ex. 7.

^[3] Ex. 3.

^[4] *Id.*

^[5] Ex. 22, Testimony of Douglas Anderson.

^[6] Ex. 22; Testimony of Scott Hoke; Testimony of Shirley Slater.

^[7] Testimony of Shirley Slater, Douglas Anderson, Greg Ingraham.

^[8] Testimony of Shirley Slater, Douglas Anderson, Greg Ingraham.

^[9] Ex. 6.

^[10] Ex. 14.

^[11] Ex. 15.

^[12] Ex. 15.

^[13] Ex. 17.

^[14] Ex. 16.

^[15] There is no evidence that the City relied on this exemption before receiving Mr. Anderson’s petition for relief in this matter.

^[16] Ex. 1.

^[17] Testimony of Douglas Anderson.

^[18] Testimony of Shirley Slater.

^[19] *Id.*

^[20] Testimony of Douglas Anderson; Ex. 12, Personnel Policy Manual at 2 (independent contractors, consultants, and other individuals covered by contractual agreements are not considered city employees). The City has provided no specific evidence as to what types of supervisory powers the City Planner/Zoning Administrator would exercise over a building inspector and a fire marshal who function as independent contractors. The concepts of “supervision” and “independent contractor” are typically mutually exclusive. It appears from the job description that the City Planner/Zoning Administrator functions basically to coordinate and facilitate the activities of these independent contractors.

^[21] Ex. 4.

^[22] Ex. 22, Testimony of Douglas Anderson.

^[23] Testimony of Douglas Anderson, Scott Hoke.

^[24] Testimony of Kenneth Anderson.

^[25] Brief of Kenneth Anderson, June 24, 2003.

^[26] Testimony of Shirley Slater.

[27] Petition for Relief under the Veteran's Preference Act, March 25, 2003.

[28] Minn. Stat. § 43A.11, subd. 1.

[29] Minn. Stat. § 43A.11, subd. 7.

[30] Minn. Stat. § 197.455.

[31] *Hall v. City of Champlin*, 463 N.W.2d 502 (Minn. 1990).

[32] Minn. Stat. § 197.46 (emphasis added).

[33] Minn. R. 1400.7300, subp. 5.

[34] Minn. Stat. § 197.46.

[35] *State ex rel. Sprague v. Heise*, 243 Minn. 367, 67 N.W.2d 906, 911 (1954); *State ex rel. McOsker v. City Council of Minneapolis*, 167 Minn. 240, 208 N.W. 1005 (1926).

[36] *Sprague*, 67 N.W.2d at 911, citing *McOsker*, 208 N.W. at 1006.

[37] *Sprague*, 67 N.W.2d at 912.

[38] *State ex. rel. McGinnis v. Police Civil Service Commission*, 253 Minn. 62, 91 N.W.2d 154, 163 (1958).

[39] 67 N.W.2d at 912; see also *State ex rel. Caffrey v. Metropolitan Airports Commission*, 310 Minn. 480, 486-87, 246 N.W.2d 637, 641 (1976) (director of public affairs was not a department head where he did not report directly to the Commission but was subject to the authority and supervision of others; he and his secretary were the only employees in the department; and he did not have authority to hire or fire others); *Holmes v. Board of Commissioners*, 402 N.W.2d 642 (Minn. App. 1987) (individual serving as zoning administrator, agricultural inspector, and civil defense director for county who was assisted in each area only by a secretary was not a department head where his duties were largely ministerial, he was subject to board directives in matters requiring the exercise of discretion, and he lacked authority to hire or fire his secretary or other subordinates).

[40] Cf. *Holmes*, 402 N.W.2d at 645 (zoning administrator's duties not sufficiently "important" to be a department head).

[41] City's post-hearing brief.

[42] Petitioner's post-hearing brief.

[43] *Grehl v. Minneapolis Public Schools*, 484 N.W.2d 815 (Minn. App. 1992); *McAfee v. Dept. of Revenue*, 514 N.W.2d 301 (Minn. App. 1994) (veteran's preference may increase the chance that a veteran will receive an interview, but the appointing authority may hire any certified applicant).

[44] The City does not dispute that, if a violation is established in this case, the petitioner would be entitled to nominal damages. The City suggests that nominal damages in the amount of \$400 would be appropriate.